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IN THE HIGH COURT OF SOUTH AFRICA
(FREE STATE DIVISION, BLOEMFONTEIN)

Reportable/ Not Reportable

Case Number: **5177/2021**

In the matter between:

DENNIS LOUW

Applicant

[ID: 7[...]]

And

SUPERDOC ONE CC

Respondent

[Registration No.: 2001/053954/230]

IN RE:

SUPERDOC ONE CC

Plaintiff

[Registration No.: 2001/053954/230]

And

DENNIS LOUW

Defendant

[ID: 7[...]]

Neutral citation: *Dennis Louw v Superdoc One CC- Case No. 5177/2021*

Coram: **S. Grobler, AJ**

Heard on: **20 February 2025**

Delivered on: **6 March 2025**

Summary: A Defendant cannot be ordered in terms of rule 47 to put up security for a plaintiff's costs, in the event of the court finding for the plaintiff against him or her with an adverse cost order. Equally a plaintiff facing a counterclaim cannot be asked- nor ordered to put up such security, before he or she is allowed to defend him- or herself further

ORDER

1. Prayers 2 and 3 are dismissed.

JUDGMENT

INTRODUCTION:

[1] This matter became before me on 20 February 2025 as an opposed motion. The Applicant ('*Mr Louw*') applied for an order in terms of r47(4), asking that the claim of the Respondent ('*Superdoc*') against him under case number 5177/2021 be dismissed, that Superdoc's defence to Mr Louw's counterclaim be struck out, that judgment in Mr Louw's favour be entered against Superdoc in terms of the abovementioned counterclaim and that in all instances Superdoc be ordered to pay the costs of the application.

[2] I granted prayers 1 and 4, but asked Mr Maree - who ably appeared for the Applicant - to submit written supplementary heads of argument concerning the court's authority to strike out a defence to a counter claim, because of a failure to put up ordered security for a main claim. Mr Maree obliged, and I thank him sincerely for the heads he submitted.

THE FACTS:

[3] Superdoc sued Mr Louw on 8 November 2021, claiming *inter a/ia* payment of R215,150.00. Mr Louw defended the action, filed a plea and significantly also a counterclaim. Superdoc subsequently filed a plea to the counterclaim.

[4] On 8 June 2023, this division granted an order in terms of which Superdoc was to comply with a notice Mr Lauw had served upon it in terms of r35. Superdoc failed to comply with the order.

[5] Mr Lauw then applied for the striking out of the claim and defence to the counterclaim. Prior to the hearing of that application, Superdoc filed its discovery affidavit, rendering that application moot.

[6] In both the abovementioned applications Superdoc was ordered to pay the costs of the proceeding. It didn't. A writ of execution was issued on 2 April 2024 and the Sheriff provided a *nu/la bona* return.

[7] Further extra curiae requests were made to Superdoc's then attorneys for the payment of the outstanding costs, but to no avail.

[8] As a consequence, and on 19 July 2024, Mr Louw served a notice in terms of r47(1), calling upon Superdoc to put up security. Superdoc didn't and after an application to compel was launched, Mhlambi J ordered on **3 October 2024 as follows:**

'1. The Respondent shall furnish security for the costs in the form of a bank guarantee or funds held in Respondent's attorney's trust account in the sum of R100,000.00 within ten days from the date of this order.

2. The Respondent's action against the Applicant and defence to the Applicant's counterclaim in the main action under case number 5177/2021 in the above Honourable Court is stayed pending the granting of such security.

3. The Applicant is granted leave to approach the court on the same papers, duly amplified, where necessary, for an order dismissing the Respondent's claim and defence to the Applicant's counter claim in the main action referred to above, in the event of the Respondent's failing to adhere to this order.

4. *The Respondent pay (sic) the costs of this application.'*

[9] Once again, the security was not put up, and the present application is the consequence.

[10] I had no doubt in ordering that Superdoc's claim be struck out because of the failure to put up the required security. I deal somewhat with the authority to do so again below, but to my mind it was clear that that order was justified. I however had significant problems with striking out the defence to- and giving judgment on the counterclaim, because of the failure to put up the ordered security. My discomfort caused the asking for and filing of supplementary heads.

Rule 47:

[11] R47 deals with issues of procedure only. It is not regarded as substantive law as to the entitlement to ask for nor the obligation to provide said security for costs.¹ The common law dictates that an incola of the Republic cannot as a general rule be called upon to give security for costs.² And that is where the Plaintiff is an incola. Mr Maree was unable to refer me to any law, nor could I find any, which states that an incola defendant (which in the context of the counterclaim Superdoc is) can be asked to put up security for it to be allowed to continue with its defence to any claim.

[12] It doesn't strike me as odd as to the reason why there appears to be no such authority. All persons, big or small, natural or artificial brought to a court have the right to defend themselves. It will be a sad day indeed if only those able to put up security for a possible adverse cost order are allowed to exercise constitutional rights of equality before the law and access to courts Those rights are of course ensconced in s9(1) of our Constitution.

¹ Fusion Properties 233 CC v Stellenbosch Municipality, (Unreported SCA case No. 932/2019) dated 29 January 2021 at para 20;

See also: Boost Sports Africa (Pty) Ltd v South African Breweries (Pty) Ltd, 2015 (5) SA 38 (SCA) at 43 C-D.

² Van Zyl v Euodla Trust (Edms) Beperk, 1983 (3) SA 394 (T) at 396 B - 397 B.

[13] Even s8 of the Close Corporations Act does not allow for the putting up of security where the close corporation is the defendant or the respondent.

[14] Mr Maree placed heavy reliance upon what he called the court's discretion, which the court no doubt enjoys under the working of the common law and in the exercising of the powers the common law provides to any court. He placed specific reliance upon the wording of r47(4). It reads:

'The court may, if security be not given within a reasonable time, dismiss any proceedings instituted or strikeout any pleadings filed by the party in default, or make such other order as it may seems meet.'

[15] Mr Maree skilfully referred to decisions such as **Wilson**³ and **Leask**⁴, for the authority that the court may regulate its own process and stop the prosecution of vexatious proceedings. But the problem with this submission is that where the court ordered the striking out of a defence, it is on the back of failure to comply with an existing obligation either in terms of the court rules or in terms of an interlocutory order of the court granted. There is a huge difference between a failure to file discovery [for instance] after being ordered to do so, and striking out of the defence for a lack of security provided. A Defendant must discover, and if she does not the court may order that she does. And when she still does not, the court may strike out the defence. To my mind, no defendant can be asked- nor ordered to put up security for costs by a plaintiff.

[16] Mr Maree also place reliance upon the court order obligating the furnishing of security earlier. The problem with this submission is that I do not believe Mhlambi J had ordered security be given for costs on the defence to the counterclaim. The order cannot be interpreted in that way. To my mind what the learned Judge did order was the furnishing of security for the main claim, and the learned Judge granted leave to Mr Lauw to approach the court again should the security not be provided for the striking out of whatever would then be competent. I am mindful of the fact that the order gives leave to approach the court for the striking out of the

³ Wilson v Die Afrikaanse Pers Publikasies (Edms) Beperk, 1971(3) SA 455 (T) at 462 H - 463 B.

⁴ Leask v East Cape Forest Production CC t/a Highbury Treated Timbers I2008) ZAECHC 171 (2 October 2008),

defence as well, but I do not think Mhlambi J meant in the order that the striking of the defence would axiomatically follow upon the failure to give security. I think the learned Judge simply paved the way for the possibility to apply, but did no more.

[17] It consequentially follows that I cannot grant prayers 2 and 3 of the Notice of Motion. Mr Louw will have to place his counterclaim on the court roll and prosecute it as an ordinary action. Of course, should Superdoc persist in its obstinacy to defend itself further to that proceeding, it will then face the consequences of a default judgement. But those consequences will be in terms of accepted principles of a party being in default at the date of trial, or having his defence struck out for another reason.

[18] In addition, then to the order I granted on 20 February 2025 the following order is made:

1. Prayers 2 and 3 are dismissed.

S. GROBLER, AJ

On behalf of the Applicant:

On instruction of

Mr Maree (Attorney)

Hill, McHardy & Herbst

BLOEMFONTEIN